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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JANETTE THOMPSON, Plaintiff and Appellant, v. McDONALD'S CORPORATION, Defendant and Respondent.	B206000 (Los Angeles County Super. Ct. No. BC355125)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Reversed.

Fine & Chais, Mickey L. Fine; The Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Matthew B. Stucky, Barry G. Kaiman and Stephen K. Hiura for Defendant and Respondent.

Plaintiff was working as a cashier at the drive-through window of a McDonald's restaurant when a man walked up to the window, opened it from the outside, grabbed plaintiff, pulled her partly through the window, and shot her with a handgun.

McDonald's Corporation (McDonald's) is the owner of the land on which the restaurant sits and the franchisor of the restaurant. Through the franchise agreement and an operator's lease, McDonald's controlled the design of the restaurant, including the selection of the type of drive-through window that was installed.

Plaintiff filed this negligence action against McDonald's, alleging that the company owed her a duty of care — to adopt safety measures to protect her from the shooting that occurred — and that McDonald's caused her injury by failing to use and maintain a drive-through window that provided adequate security.

McDonald's moved for summary judgment, arguing that it owed plaintiff no duty of care and that a drive-through window of a different kind would not have prevented the incident. Plaintiff responded with evidence that numerous criminal acts had previously occurred at the restaurant. The trial court determined that disputed issues existed as to whether McDonald's owed plaintiff a duty of care but that her proposed safety measure — a more secure window — would not have prevented the incident.

On appeal, McDonald's does not challenge the determination as to the duty of care. Rather, it contends the trial court properly found that causation was lacking as a matter of law. We conclude otherwise for two independent reasons. First, McDonald's failed to meet its initial burden in moving for summary judgment, such that it was not entitled to summary judgment regardless of the evidence submitted by plaintiff. Second, the evidence gives rise to at least one disputed issue of material fact on causation.

I

BACKGROUND

We accept as true the facts and reasonable inferences supported by plaintiff's evidence and defendant's undisputed evidence on the motion for summary judgment. (See *Raghavan v. Boeing Co.* (2005) 133 Cal.App.4th 1120, 1125.)

Sanders-Clark & Co., Inc. (Sanders-Clark), owns the McDonald's restaurant at 2838 Crenshaw Boulevard in Los Angeles, California. McDonald's owns the land on which the restaurant is located and characterizes itself as Sanders-Clark's commercial landlord. Sanders-Clark is the franchisee of the restaurant; McDonald's, the franchisor. The relationship between Sanders-Clark and McDonald's is governed by two documents: a franchise agreement and an operator's lease. Together, those documents controlled how the restaurant was built and how it is managed and maintained.

The restaurant was originally built in the late 1960's. It was remodeled in 2001 in strict compliance with McDonald's specifications. The architect and contractors reported to a McDonald's senior project manager. In Southern California, McDonald's used three approved architects and a group of "captive" contractors. Sanders-Clark used an approved architect and contractor.

The drive-through window, made by Ready Access, was selected by McDonald's. Ninety-nine percent of all McDonald's restaurants use one of three types of Ready Access drive-through windows: manual, self-closing, or electric. In this instance, McDonald's chose a self-closing window for the restaurant: The cashier slides the window open by hand, and the window automatically closes when the cashier removes her hand. According to one of the restaurant's owners and another witness knowledgeable about McDonald's security, when the window closes, it self-locks and cannot be opened from the outside. Plaintiff offered conflicting evidence indicating that after the window closed, it would not self-lock and could be opened from the outside unless the cashier had manually used a "black knob" to lock it.

Sixty-seven percent of the business at the restaurant was transacted by way of the drive-through. After drive-through customers place their order, they drive to the cashier window to pay. A single cashier handles all transactions. After paying, customers drive to a second window, where they are handed the food. The restaurant used one or more security guards, and a surveillance camera monitored activity at the drive-through cashier area.

On January 26, 2005, around 7:30 p.m., a man in his 20's approached the cashier's window on foot and tapped on it. Sanders-Clark trains its employees not to open the drive-through window for pedestrians. This policy is intended to keep pedestrians from "reach[ing] in." Nevertheless, Janette Thompson, a 16-year-old working as the drive-through cashier, was startled by the tapping and opened the window. The man held out a quarter and asked for change. Thompson asked if he wanted two dimes and a nickel. He said yes. Thompson took her hand off the window, and it closed completely. As Thompson was making change, the man opened the window, grabbed Thompson's left arm, and pulled her upper body through the window. With Thompson's head pointing downward, he said, "Give me the money." The man then shot Thompson in the abdomen with a handgun and fled. The bullet perforated Thompson's intestine, fractured her spine, and exited her back.

Police reports showed that between 2000 and 2004, the restaurant had six robberies, three burglaries, and three assaults with a deadly weapon. Two of these crimes involved the drive-through in some manner. Several involved gunfire or the use of guns. Sanders-Clark also owned two other McDonald's restaurants a couple of miles away. Similar crimes had occurred at those locations during the same period of time. Further, a Taco Bell at 2800 Crenshaw, a cleaners at 2817 Crenshaw, a video store at 2853 Crenshaw, and a pizza restaurant at 2829 Crenshaw had all experienced a series of robberies, batteries, and burglaries between 2000 and 2004.

On July 7, 2006, Thompson filed this action against McDonald's, alleging a single cause of action for negligence. The complaint alleged that McDonald's had "failed to exercise ordinary care in the management and maintenance of the property . . . by failing to provide adequate security, including the installation and maintenance of security windows [and] security drawers at the drive-through station."

McDonald's filed a motion for summary judgment or, in the alternative, for summary adjudication of issues, asserting that it could not be held liable because, as the franchisor, it did not own, operate, or control the restaurant. McDonald's also argued it did not owe Thompson a duty of care because the incident was not reasonably

foreseeable. In addition, the company contended that, assuming it had such a duty and that the duty was breached, the breach was not the cause of the incident.

Thompson filed opposition papers, detailing the prior crimes at the restaurant and in the area, arguing that a bullet-resistant window or a sliding cash drawer (similar to a bank teller drawer) would have prevented the incident. Thompson also filed a declaration from Chris E. McGoey, who claimed to be an expert in crime prevention. He opined that a bullet-resistant window would have prevented Thompson's injury. McDonald's filed objections to McGoey's declaration based on his lack of expertise, lack of foundation, and his use of speculative and conclusory statements.

The motion was heard on October 23, 2007. The trial court denied summary adjudication on the issue of the duty of care, stating that triable issues of material fact existed with respect to McDonald's control over the restaurant and the reasonable foreseeability of the crime. The court reached a different conclusion on the issue of causation, stating that plaintiff had failed to present evidence supporting an "actual causal link" between "defendant's alleged negligence and [her] injury." Further, the trial court sustained the lack of foundation objection to McGoey's declaration, rendering it of no value. Because the trial court found no causation as a matter of law, summary judgment was granted. On November 29, 2007, a formal order and a judgment were entered to that effect.

Thompson filed a motion for a new trial, which was denied. She appealed.

II

DISCUSSION

Summary judgment is appropriate if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

"'"A defendant seeking summary judgment has met the [initial] burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established [or that there is a complete defense to that cause of action]. . . . Once the defendant's burden is met, the burden shifts to the

plaintiff to show that a triable issue of fact exists as to that cause of action. . . . In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. . . . We must determine whether the facts as shown by the parties give rise to a triable issue of *material* fact. . . . In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed." . . . We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. . . . [T]he facts [set forth] in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true.'" (*Buxbaum v. Aetna Life & Casualty Co.* (2002) 103 Cal.App.4th 434, 441, italics added.)

If the defendant does not meet its initial burden, then the burden of going forward does not shift to the plaintiff. Indeed, the motion should be denied even if the plaintiff makes no showing at all. (See *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840; *Pepperell v. Scottsdale Ins. Co*. (1998) 62 Cal.App.4th 1045, 1054; see also *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 467–469.)

Under these principles, the summary judgment in this case must be reversed for two independent reasons.

A. McDonald's Failed To Carry Its Initial Burden

In summary judgment proceedings, the moving party bears the initial burden of production to make a prima facie showing that there is no triable issue of material fact. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The pleadings determine what issues are material. (See *Keniston v. American Nat. Ins. Co.* (1973) 31 Cal.App.3d 803, 812.) Thus, McDonald's *evidence* had to be directed to the allegations in the complaint. The company had to show that the undisputed facts, when applied to the issues framed by the complaint, entitled it to judgment. (See *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 66–67.) It failed to do so.

The complaint alleged that McDonald's negligently failed to install a "security drawer[] at the drive-through station." If a security drawer had been installed — through which only cash were passed — there would have been no openable window, and the

assailant could not have even touched Thompson, much less reached through and pulled her halfway outside before shooting her.

In its moving papers, McDonald's offered no evidence that its use of an *openable* window — instead of an unopenable window with a drawer — was not a cause of the incident. Nor did the company offer any evidence that the incident would have happened anyway if it had used an *unopenable* window. On appeal, McDonald's points to no evidence in that regard and presents no argument along those lines. Rather, it cites evidence submitted by Thompson in her opposition papers concerning problems the company encountered when it attempted to use security drawers at two other restaurants. Although that evidence may be relevant to the issue of negligence — an issue on which we express no opinion — it has no bearing on causation: It has no tendency to prove or disprove that McDonald's use of an openable window "was a 'substantial factor' in bringing about [Thompson's] injury." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778.)

Thus, McDonald's failed to meet its initial burden of making a prima facie showing that the openable window was not a cause of the incident. The burden never shifted to Thompson on that point. For this reason alone, the judgment must be reversed.

B. Disputed Issue of Material Fact

McDonald's does not challenge the trial court's determination that disputed issues exist as to whether the company owed Thompson a duty of care. Thus, the question before us is whether at least one disputed issue of material fact exists as to causation, and we express no view on the issue of duty. We conclude that, on this record, causation cannot be resolved as a matter of law.

The leading authority on causation in these circumstances is *Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th 763. As the court stated there: "[The cases] explain that, to demonstrate actual or legal causation, the plaintiff must show that the defendant's act or omission was a 'substantial factor' in bringing about the injury. . . . [P]laintiff must show some substantial link or nexus between omission and injury. . . .

"Plaintiff overstates her case when she contends that adopting the 'substantial factor' approach to the causation issue would make it virtually impossible to recover from landlords or other property owners for negligence in failing to take reasonable protective measures to safeguard others from the criminal assaults of third persons. Plaintiff asserts that a finding of causation would be justified 'only if a criminal is caught, and then only if the criminal testifies what specific lack of deterrence on the property made easier his or her opportunity to commit the crime . . . .' We disagree, for we can readily hypothesize cases in which the evidence discloses an actual and substantial causal link between the criminal assault and the defendant's negligence.

"Thus, in a given case, direct or circumstantial evidence may show the assailant took advantage of the defendant's lapse (such as a failure to keep a security gate in repair) in the course of committing his attack, and that the omission was a substantial factor in causing the injury. Eyewitnesses, security cameras, even fingerprints or recent signs of break-in or unauthorized entry, may show what likely transpired at the scene. In the present case no such evidence was presented, but the circumstances in other cases may well be different. . . .

"[One case] lucidly explained that 'We think it comes down to this: When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person. . . . But where, as here, we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented.'" (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at pp. 778–779, citations omitted.) "[W]hen an injury can be prevented by a simple physical device, then it is technically *possible* for the landowner's failure to install such a device to be a legal cause of a plaintiff's injuries. By no stretch of the imagination, however, [is] the failure to install such a device, without more, . . . sufficient to *prove* causation." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 485,

fn. 5.) And a landlord need not provide security at "inordinate expense." (*Saelzler*, at p. 777.)

"[W]e hesitate to adopt a rule of common sense that seemingly would prevent summary judgment on the causation issue *in every case* in which the defendant failed to adopt increased security measures of some kind. [As one court has observed,] 'it would be grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were "inadequate," particularly in light of the fact that the decision would always be rendered in a case where the security had, in fact, proved inadequate . . . .' . . . [I]f we simply relied on hindsight, the mere fact that a crime has occurred could always support the conclusion that the premises were inherently dangerous." (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 778.)

"[T]he plaintiff must do more than simply criticize, through the speculative testimony of supposed security 'experts,' the extent and worth of the defendant's security measures, and instead must show the injury was actually caused by the failure to provide greater measures. . . . [A] different rule would 'make the landowner the insurer of the absolute safety of everyone who enters the premises.'" (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 774.) "[T]he plaintiff must establish, by nonspeculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures." (*Ibid*.) "'A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.'" (*Id.* at pp. 775–776, italics omitted.)

In short, Thompson was required to submit "'evidence [tending to show] that it was *more probable than not* that, but for the landlord's negligence, the assault would not have occurred.'" (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 775.)

McDonald's argues in its brief that causation is lacking because it installed a self-locking window that could not be opened from the outside and that Thompson's injuries were caused by a shot "through an open window *that she herself opened*." (Italics added.)

Thompson testified that *her assailant* opened the cashier's drive-through window *after* it completely closed. This permitted the assailant to reach *inside* the restaurant, grab her arm, pull her halfway outside, and shoot her. McDonald's submitted testimony that the window would automatically lock when it closed and could not be opened from the outside. Thompson, on the other hand, testified that the window would not automatically lock, and the cashier had to manually lock it with a black knob. If the jury credited her evidence, it could find that McDonald's choice of a manually locking window instead of an automatically locking window caused the incident. That is, a jury could find that if the assailant had not been able to open the window after it completely closed, he could not have pulled Thompson through the window and shot her. (The choice of one type of window over another goes to the issue of negligence, which, as noted, we do not address.)

Accordingly, for purposes of defeating summary judgment, Thompson established at least one disputed issue of fact as to whether McDonald's alleged "act or omission was a 'substantial factor' in bringing about [her] injury." (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 778.) On this record, there is a disputed issue as to whether "'it was more probable than not that, but for the landlord's [alleged] negligence, the assault would not have occurred.'" (*Id.* at p. 775, italics omitted.)

McDonald's emphasizes that McGoey's declaration was inadmissible, such that there was no expert testimony on causation. That might make a difference if his declaration had contained the *only* evidence concerning causation. (See *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1115.) But it did not.

Finally, this case is readily distinguishable from those in which causation could not be proved. Thompson does not speculate that better lighting would have prevented her injury (see, e.g., *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1196–1197, disapproved on another ground in *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 853, fn. 19; *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 211–212) or that a greater number of security guards would have thwarted the crime (see, e.g., *Noble v. Los Angeles Dodgers, Inc.* (1985) 168 Cal.App.3d 912, 916, 918; *Nola M. v.*

University of Southern California (1993) 16 Cal.App.4th 421, 437–438; *Lopez v. McDonald's Corp.* (1987) 193 Cal.App.3d 495, 515–517).

Nor does Thompson speculate as to whether a broken device or mechanism permitted an assailant to enter the premises. (See *Leslie G. v. Perry & Associates*, *supra*, 43 Cal.App.4th at pp. 483, 487–488 [no showing of causation where rapist could have entered apartment building other than through broken security gate].) Here, the jury could properly find that the design of the cashier's window allowed the assailant to commit the crime. The means of "entry" is known.

The present case comes within the rule that "'[w]hen an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person.'" (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 779.)

We therefore conclude that McDonald's did not satisfy its initial burden in moving for summary judgment because it offered no evidence disputing Thompson's allegation that the lack of a security drawer caused the incident, and, in the alternative, at least one disputed issue of material fact precludes resolution of the causation issue as a matter of law.

III

DISPOSITION

The judgment is reversed. Appellant is entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.